FIRST DIVISION
November 9, 2015

No. 1-14-3304
2015 IL App (1st) 143304-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ILLINOIS NEUROSPINE INSTITUTE, P.C.,	)	
	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 11 L 5236
CAROLYN BUTLER and JOSEPH DOMBROWSKI,	)	
	)	Honorable
Defendants-Appellants.	)	Eileen O'Neill Burke,
	)	Judge Presiding.
	)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Liu and Justice Cunningham concurred in the judgment.

ORDER

Held: The trial court erred when it granted summary judgment in favor of plaintiff on its breach of contract count since a genuine issue of material fact existed regarding whether plaintiff performed its duties under the contract. Further, because a question of fact existed regarding whether Butler owed a debt to plaintiff and thus whether plaintiff had any lien rights, summary judgment was also improper against Dombrowski on the constructive trust count.

¶ 1 Defendants, Carolyn Butler (Butler) and Joseph Dombrowski (Dombrowski), appeal the orders of the trial court that granted plaintiff's, Illinois Neurospine Institute, P.C.'s, motion for summary judgment, denied defendants' motion to reconsider, and entered judgment in the amount of $105,107.09 against Butler for breach of contract and $31,346.25 against Dombrowski for constructive trust. Specifically, defendants argue: (1) the trial court erred in granting summary judgment as to liability against defendants; (2) the trial court erred in denying defendants' motion to reconsider; (3) the trial court erred in finding that an independent medical examination is covered under the Illinois Healthcare Services Lien Act (the Act) (770 ILCS 23/10 *et seq.* (West 2010)); and (4) the trial court's findings that plaintiff's bills for medical services were reasonable and that plaintiff was entitled to a constructive trust against Dombrowski were against the manifest weight of the evidence. We find the trial court improperly granted summary judgment as to both counts of plaintiff's complaint; thus, we vacate the judgment against both defendants and remand for further proceedings.

¶ 2 BACKGROUND

¶ 3 Butler was injured in a car accident on May 11, 2009. She retained Dombrowski to represent her in her personal injury action against the other driver in case number 10 L 13174, which was filed in the Circuit Court of Cook County on November 18, 2010. Butler was first seen by plaintiff's Dr. Ronald Michael (Dr. Michael) on November 16, 2009. She continued to receive medical services from plaintiff through September 27, 2010.[1] All of Butler's medical services were rendered by Dr. Michael and included discography and discectomy procedures. On November 16, 2009, plaintiff sent a document entitled "Notice of Physician's Lien" (the lien notice) to Dombrowski via certified mail. The document stated, in its entirety:

"Date: 11/16/09

[1] Butler's medical records were not made a part of the record on appeal in this case.

Re: Carolyn Butler
Account: 3906
Date of Injury: 05/11/09
Provider: Ronald Michael, M.D.

You are hereby notified that the above named patient, who was injured by an alleged negligent or wrongful act (on the date indicated above) for which said patient has a claim, demand or cause of action, had an independent medical examination by the undersigned because of said injuries. Copies of the itemized bill will be provided upon request.

Names of parties lien has been sent to:

Attorney: Dombrowski & Sorenson Attorneys At Law
Joseph Dombrowski
[address omitted]

Patient: Carolyn Butler
[address omitted]

You are further notified that the undersigned is a licensed and practicing physician in the State of Illinois, whose name and address are listed below, hereby claims a lien upon any claim or demand or cause of action which the said party may have for the amount of reasonable charges up to the date of payment of damages, in accordance with Illinois Statute 770 ILCS 80/1.

Medical Provider: Dr. Ronald Michael
Illinois Neurospine Institute
[address omitted]."

¶ 4 At the bottom of the lien notice was the signature of Dr. Michael and a signed notary seal. In response, Dombrowski sent a letter dated December 8, 2009, which asked that plaintiff send "[its] complete bill and medical records for [Butler]." The letter further stated: "I note you claim a lien for an independent medical exam. I am unaware of any IME in this matter. Would you be so kind as to explain how you think an IME results in a lien on a personal injury case?" The name "Joseph Dombrowski, Attorney At Law" appeared at the end of the letter; however, the copy of the letter which appears in the record on appeal did not bear a signature. There is no evidence in the record that plaintiff ever responded to the letter.

¶ 5 On January 27, 2010, Butler signed a one page document entitled "Financial Responsibility Statement" (the contract). In relevant part, the contract read:

¶ 6 "Payment Guarantee:

For and in consideration of services rendered by ILLINOIS NEUROSPINE INSTITUTE, patient (responsible person) hereby agrees to and guarantees payment of all charges incurred for the account of the patient.

* * *

Assignment of Insurance Benefits:

Patient (responsible person) irrevocably assigns and transfers to ILLINOIS NEUROSPINE INSTITUTE all right, title and interest to medical reimbursement benefits under any and all applicable medical insurance policies covering patient for the payment of hospital and medical care being provided. Patient (responsible person) authorizes payment directly to ILLINOIS NEUROSPINE INSTITUTE of said medical reimbursement benefits.

Agreement to Pay Balance:

In the event that said medical insurance coverage is not sufficient to satisfy the charge in full, patient (responsible person) acknowledges that the resulting balance is not covered by this assignment and agrees to be fully responsible for the payment of any balance due. For any non-contracted insurance carriers, ILLINOIS NEUROSPINE INSTITUTE will submit a courtesy claim and if no payment is received in sixty (60) days, the balance will become patient responsibility. Patient (responsible person) acknowledges responsibility for any expenses incurred by ILLINOIS NEUROSPINE INSTITUTE for collecting any of the charges incurred on the account of the patient." (Emphasis in original.)

¶ 7 Sometime thereafter, Butler's personal injury case settled for $325,000.00. On November 30, 2010, Dombrowski filed a motion to adjudicate the liens of Butler's healthcare service providers, none of which were plaintiff. The motion to adjudicate was presented to the trial court on December 7, 2010, and an order was entered that granted the motion to adjudicate the liens contained in the motion. Subsequently, Dombrowski disbursed the proceeds of the settlement to the lien holders who were included in the motion.

¶ 8 On May 20, 2011, plaintiff filed its two count complaint (the complaint) from which this appeal stems. Count I of the complaint alleged liability against both Butler and Dombrowski under the theory of constructive trust for failure to adjudicate plaintiff's lien. Count II of the complaint alleged that Butler was liable for breach of contract for failure to pay for medical services rendered by plaintiff. On November 8, 2011, defendants filed their answer and affirmative defenses. Defendants' three affirmative defenses were: (1) the complaint failed to

state a claim upon which relief could be granted; (2) the claim was barred because the Act (770 ILCS 23/10 *et seq.* (West 2010)) did not apply to plaintiff's lien; and (3) the amount claimed was unreasonable. Thereafter, this matter proceeded through discovery. Defendants' expert, Danelle Kelly, testified in a discovery deposition on May 2, 2014, and Dr. Michael, plaintiff's officer and expert, sat for his discovery deposition on May 14, 2014.

¶ 9 On July 9, 2014, plaintiff filed its motion for summary judgment or summary determination, supported by the affidavit of Dr. Michael. Plaintiff argued that there were no issues of material fact to preclude the trial court's finding of a constructive lien because Dombrowski breached his statutory duty to plaintiff to distribute settlement proceeds to lien claimants *pro rata*. Plaintiff also asserted that there were no genuine issues of material fact regarding liability for breach of contract since it could satisfy all the requisite elements for a breach of contract claim. Finally, plaintiff argued that, (based on the testimony of Dr. Michael) there was no genuine issue of material fact as to the reasonableness of the medical bills.

¶ 10 In their response, defendants asserted that the reason that no funds were distributed to plaintiff was that none were due. Specifically, defendants contended that plaintiff could not recover under a theory of breach of contract because plaintiff materially breached the contract when it failed to submit a claim to Butler's insurance carrier as required by the courtesy claim clause of the contract. Likewise, defendants argued that plaintiff could not impose a constructive trust on the fees since it had breached the contract. Further, defendants argued that the notice of lien that was sent to Dombrowski, and the lien itself were not valid because the notice of lien stated that it was for an independent medical examination, which is a litigation cost. Defendants also asserted that since there was a dispute over the reasonableness of the fees, an issue of fact remained and summary judgment was improper. Lastly, defendants made a brief alternative

argument that there had been an account stated that precluded plaintiff's claims. Defendants did not attach a counter-affidavit to support their response. However, they attached both Butler's and Dombrowski's answers to plaintiff's requests to admit, which were signed under penalty of perjury pursuant to Section 1-109 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/1-109(West 2010)), a copy of Butler's insurance card, the transcript from the discovery deposition of their expert, Kelly, and the transcript from Dr. Michael's discovery deposition, *inter alia*, as support for their position.

¶ 11 In its reply brief, plaintiff argued that defendants' response failed to raise any genuine issue of material fact to preclude the court's finding of summary judgment. Primarily, plaintiff emphasized that defendants failed to rebut the affidavit of Dr. Michael because none of the documents attached to defendants' response were sworn statements premised on the actual knowledge of a party or witness. Plaintiff further contended that defendants failed to plead their argument as an affirmative defense and that their argument was not supported by Illinois law regarding assignments. Similarly, plaintiff asserted that it was not contractually obligated to submit charges for payment to Butler's insurance company under the language of the assignment clause of the contract. Next, plaintiff pointed out that defendants' answers to the requests to admit were not sufficient to raise genuine issues of material fact because some of the answers were made "on information and belief." Plaintiff also reiterated its argument that Dombrowski breached his statutory duty when he disbursed the settlement funds without including plaintiff. Plaintiff further contended that defendants' response failed to raise an issue of fact regarding the reasonableness of the medical charges at issue because Kelly testified using a hypothetical situation involving which claims she would allow or deny if she were an insurance adjuster, not whether Dr. Michael's bills were usual, customary, and reasonable. Finally, plaintiff refuted

defendants' argument on the theory of an account stated by asserting that defendants had not paid or even promised to pay the amount allegedly included on an invoice. Plaintiff also asserted the amount on the invoice was a typographical error. Nonetheless, plaintiff argued there could not be an account stated without a promise to pay.

¶ 12 On September 3, 2014, the trial court entered its written decision, which granted plaintiff's motion for summary judgment. The trial court found that "a review of [the contract] does not expressly place a duty or burden upon [p]laintiff to submit the relevant bills directly to Butler's insurance provider. Rather, the [contract] merely states that '[Butler] irrevocably assigns and transfers to [plaintiff] all right, title and interest to medical reimbursement benefits under any and all applicable medical insurance policies covering [Butler], for the payment of hospital and medical care being provided.' " The court emphasized that "[n]owhere in the agreement does it state that [p]laintiff is responsible for submitting all bills to Butler's insurance." As a result, on the issue of breach of contract, the trial court found for those reasons and because defendants failed to assert plaintiff's purported breach as an affirmative matter, there was no issue of fact as to Butler's failure to pay under the contract. Further, the court pointed out that Butler did not set forth any basis for her non-payment under the contract that would preclude plaintiff's recovery.

¶ 13 Next, the trial court's order addressed the validity of plaintiff's lien and found that "[s]imilar to the logic above, in that [p]laintiff had no obligation to seek recovery from Butler's insurance as opposed to Butler herself, the purported lien is likely enforceable despite [d]efendants' contention that, due to plaintiff's alleged breach of the payment agreement, [p]laintiff can have no lien." The court further explained that although defendants cited the case of *Cole v. Byrd*, 167 Ill. 2d 128, 139 (1995), it did not find their argument convincing because "*Cole* concerned the Workers' Compensation Act, and not the Illinois Health Care Services Lien

Act." Specifically, the trial court recognized that the *Cole* court had found that the independent medical examination was an administrative expense for the insurance provider that was not reimbursable to the plaintiff since plaintiff only benefitted from it incidentally. The court contrasted that case with the case at bar by holding that "while the subject lien document states that [p]laintiff performed an independent medical examination upon Butler, the related invoices [] and deposition by [d]efendants' expert, Danelle Kelley [*sic*] suggest that [p]laintiff provided services far beyond an examination alone."

¶ 14 In deciding the issue of constructive trust, the trial court noted that defendants ignored the fact that plaintiff sought a constructive trust against both Butler and Dombrowski. The court expounded that although plaintiff was not entitled to a constructive trust against Butler because there was an adequate remedy at law, namely, a claim for breach of contract, plaintiff could nonetheless maintain its cause of action for constructive trust against Dombrowski.

¶ 15 Finally, the trial court acknowledged that there was a factual dispute regarding the amount charged by plaintiff for its services. The court stated that plaintiff made much of the fact that Kelly opined from the perspective of an insurance adjuster, however, plaintiff ignored her credentials and her opinion regarding the excessiveness of Dr. Michael's fees. Thus, the court ordered that "[p]laintiff's [m]otion for [s]ummary [j]udgment is GRANTED AS TO LIABILITY with respect to [c]ount II as to Dombrowski alone, and GRANTED AS TO LIABILITY with respect to [c]ount I as to Butler.[2] The parties shall appear before the [c]ourt on October 2, 2014 at 10:00 am for prove up of damages with testimony by live witnesses."

[2] Based on the trial court's analysis, it is clear that the language at the end of its order contains a typographical error and should read that the motion for summary judgment was granted with respect to count I as to Dombrowski alone and count II as to Butler rather than the inverse. The plaintiff's complaint did not name Dombrowski as a co-defendant in count II, thus it would be impossible for the court to grant summary judgment in the manner stated at the end of its order.

¶ 16 On September 12, 2014, defendants filed a motion to reconsider the court's order granting summary judgment, or in the alternative, certification pursuant to Illinois Supreme Court Rule 304 (Ill. S. Ct. R. 304 (eff. Feb. 26, 2010)). In their motion to reconsider, defendants argued that the trial court had erred in its application of the law to the facts at bar. Defendants argued that the express language of the contract, which read that plaintiff "will submit a courtesy claim and if no payment is received in sixty (60) days, the balance will become patient responsibility" directly contradicted the court's holding. Defendants asserted that based on the language of the contract, it was only upon Butler's insurance company's failure to pay a portion or all of the plaintiff's charges that Butler would be liable for the charges. Defendants then quoted the court's September 3, 2014 order, which stated that "Defendants argue that it is [p]laintiff who breached the underlying agreement entered into by Butler, given that [p]laintiff was thereunder responsible for submitting bills to Butler's insurance provider, in that the agreement expressly assigned all rights to insurance benefits held by Butler to [p]laintiff," and asserted that the court misstated their argument. Specifically, defendants contended that their argument was not that the assignment of benefits created a duty to submit charges to Butler's insurance company, but that the clause of the contract that stated that plaintiff "will submit a courtesy claim" to Butler's insurance company created an obligation.

¶ 17 Defendants also argued that the trial court erred when it applied the Act (770 ILCS 23/10 *et seq.* (West 2010)). Defendants asserted that strict lien compliance is required under Illinois law and that plaintiff failed to comply with the requirements when it sent a notice of lien for an independent medical examination, not treatment, care or maintenance. Finally, defendants requested that if the court denied their motion to reconsider, then it should allow language

pursuant to Rule 304 (eff. Feb. 26, 2010) language so that they may appeal and stay the remaining proceedings in the interim.

¶ 18 In response, plaintiff asserted that defendants' argument in their motion to reconsider failed for the same reason that it failed in their response to the summary judgment motion: namely, that there was no affirmative obligation for plaintiff to bill a patient's medical insurance carrier. Plaintiff contended that even if the court accepted defendants' reading of the clause of the contract that stated that plaintiff "will submit" its bills to Butler's insurance carrier, then defendants' arguments still fail because they did not present any evidence to prove this purported breach by plaintiff. Plaintiff also emphasized that defendants did not present a counter affidavit to rebut Dr. Michael. Plaintiff further suggested that defendants ignored the "promise to pay" language of the contract that stated that Butler "hereby agrees to and guarantees payment of all charges incurred for treatment of the patient." Additionally, plaintiff argued that defendants' interpretation of the courtesy claim language ignores its context. Plaintiff argued that the plain meaning of the courtesy claim clause was that a patient was not absolved of his or her duty to pay when a claim was submitted to an insurance carrier and the carrier paid less than the full amount owed. Finally, plaintiff asserted that the court's ruling on the lien issue should not be reconsidered because the court's ruling was clear that plaintiff's services were included in the lien. Plaintiff claimed that defendants waived any argument attacking the perfection of the lien since they failed to timely adjudicate the lien and disburse the settlement funds. Plaintiff further contended that a case cited by defendants, *Meier v. Olivero*, 279 Ill. App. 3d 630, 631 (1996), is inapposite because the lien in this case includes all relevant and required information. The defendants did not file a reply.

¶ 19 On October 2, 2014, the court entered a written order that denied defendants' motion to reconsider and held that it had not erred in its application of the law when it entered its September 3, 2014 order granting summary judgment. Regarding defendants' argument that plaintiff had a contractual duty to bill Butler's insurance company, the court held that "it is apparent from the deposition testimony, as well as the pleadings, that Butler agreed to be personally responsible for [p]laintiff's charges, regardless of whether her insurance provider made any remuneration to [p]laintiff regarding the charges. Thus, in addition to her existing duty to cover the expenses arising under [p]laintiff's services, Butler failed to illustrate that her purported insurance provider is 'non-contracted' under the scope of the [contract]." Next, the court addressed defendants' arguments regarding the applicability of the Act to independent medical examinations and found that its ruling in the September 3, 2014 order was "an accurate reflection of Illinois law." The court concluded that because the medical services rendered in this case did not result from a workplace injury, plaintiff may seek recovery under the Act in the form of a lien, stating that "[d]efendants take issue only as to the applicability of [the Act] with respect to the lien, not to the form or substance of the lien documents themselves." Finally, the court held that even if plaintiff were under an obligation to bill Butler's insurance carrier, which it was not, defendants cannot avoid their duty to pay plaintiff under the Act. The order was silent as to defendants' request for language pursuant to Rule 304 (eff. Feb. 26, 2010).

¶ 20 On October 2, 2014, the trial court also held a hearing on the reasonableness of plaintiff's fees and a prove up of damages. Dr. Michael testified for plaintiff and Kelly testified for defendants. At the conclusion of the hearing, the court entered an order that entered judgment in favor of plaintiff on count I for constructive trust and against Dombrowski in the amount of

$31,346.25 and in favor of plaintiff on count II for breach of contract and against Butler in the amount of $105,107.09. Defendants filed their notice of appeal on October 24, 2014.

¶ 21 ANALYSIS

¶ 22 In reviewing a trial court order granting summary judgment, our review is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill.2d 90, 102 (1992).

¶ 23 A motion for summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). A plaintiff may move for summary judgment "at any time after the opposite party has appeared or after the time within which he or she is required to appear has expired." 735 ILCS 5/2-1005(a) (West 2010). Section 5/2-1005(a) of the Code also provides that "a plaintiff may move with or without supporting affidavits ***." 735 ILCS 5/2-1005(a) (West 2010). Further, "[t]he opposite party *may* prior to or at the time of the hearing on the motion file counteraffidavits." (Emphasis added.) 735 ILCS 5/2-1005(c) (West 2010). Pleadings, depositions, admissions, and affidavits on file must be construed against the movant and in favor of the opponent of the motion, although the opponent cannot rely simply on his complaint or answer to raise an issue of fact when the movant has supplied facts which, if not contradicted, would entitle such a party to a judgment as a matter of law. *Addison v. Whittenberg*, 124 Ill. 2d 287, 294 (1988). While the summary judgment procedure is an important tool in the prompt administration of justice, it is a drastic measure and should only be granted where the movant's right is so clear as to be free from doubt. *Olson v. Etheridge*, 177 Ill. 2d 396, 404 (1997). An order allowing summary judgment will be reversed on appeal if the reviewing court determines that a genuine issue of material fact exists. *Department of Revenue v.*

Heartland Investments, Inc., 106 Ill. 2d 19, 31 (1985). We find that a genuine issue of material fact exists as to both counts of plaintiff's complaint, thus we reverse the trial court's granting of summary judgment, vacate the judgments entered pursuant thereto, and remand for further proceedings.

¶ 24 Breach of Contract

¶ 25 To remain consistent with the order in which the issues were addressed by the trial court's decisions and the parties' arguments on appeal, we first consider plaintiff's breach of contract claim against Butler. We find that summary judgment on this count was improper because a question of fact exists as to whether plaintiff performed its obligations under the contract. To succeed on a claim for breach of contract, a plaintiff must plead and prove: (1) the existence of a contract, (2) the performance of its conditions by the plaintiff, (3) a breach by the defendant, and (4) damages as a result of the breach. *Carlton at the Lake, Inc. v. Barber*, 401 Ill. App. 3d 528, 531 (2010).

¶ 26 The element of a breach of contract claim that is relevant in the instant appeal is plaintiff's performance of the conditions of the contract. Prior to determining if plaintiff performed under the contract, we must first decide what plaintiff's obligations were. Defendants argue that according to the plain language of the contract, plaintiff was contractually required to submit its bills to Butler's insurance company before Butler became responsible for any payment. Plaintiff asserts that no such duty existed. In its September 3, 2014 order, the trial court found that "a review of the attached agreement does not expressly place a duty or burden upon [p]laintiff to submit the relevant bills directly to Butler's insurance provider." We disagree.

¶ 27 Contract interpretation presents a question of law, which we review *de novo*. *Shaffer v. Liberty Life Assurance Co. of Boston*, 319 Ill. App. 3d 1048, 1051 (2001). When interpreting a

contract, a court's objective is to ascertain and give effect to the intent of the parties. *Carey v. Richard Building Supply Co.*, 367 Ill. App. 3d 724, 726-27 (2006). The plain language of a contract provides the best evidence of the parties' intent. *Id.* at 727. The terms of a written agreement, if not ambiguous, should generally be enforced as they appear, and those terms will control the rights of the parties. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 479 (1998). Any ambiguity in the terms of a contract must be resolved against the drafter of the disputed provision. *Id.* (citing *Duldulao v. St. Mary of Nazareth Hospital Center*, 115 Ill. 2d 482, 493 (1987)).

¶ 28 In this case, the contract stated that "[f]or any non-contracted insurance carriers, ILLINOIS NEUROSPINE INSTITUTE will submit a courtesy claim and if no payment is received in sixty (60) days, the balance will become patient responsibility." (Emphasis in original.) Defendants contend that this language is unambiguous and clearly creates a duty for plaintiff to submit a patient's bills to the insurance carrier before any amount due becomes the responsibility of the patient. We agree with defendants' reading of the contract and find that based on the plain and unambiguous language of the contract, plaintiff did, in fact, have a duty to bill Butler's insurance carrier before any amount owed became her responsibility.

¶ 29 Illinois courts interpret the word “may” as permissive and “shall” as mandatory in private contracts. *Professional Executive Center v. LaSalle National Bank*, 211 Ill. App. 3d 368, 379 (1991). According to Merriam Webster's Dictionary, the verb "will" is used to express a command, exhortation, or injunction. Merriam-Webster Online Dictionary (2015), available at http://www.merriam-webster.com/dictionary/will (last visited Oct. 20, 2015). In this case, the contract uses the verb "will" and specifically reads that plaintiff "*will* submit a courtesy claim." This use is consistent with the definition of "will" as a command. Notably, the contract does not

use the term "may" or "can" submit a courtesy claim. To this court, the plain meaning of the word "will" is more like the word "shall" than the word "may," and it is clear that the submission of bills to the insurance carrier was intended to be mandatory, not permissive. Further, the contract expressly states that plaintiff "will submit a *courtesy* claim." (Emphasis added.) The use of the word "courtesy" indicates to this court that the submission of bills to an insurance carrier may not typically be mandatory. However, by using the word "courtesy," the plaintiff was acknowledging its intent to undertake a duty that if not expressly stated would not usually be assumed.

¶ 30 This court construes a contract as a whole and the construction should be a natural and reasonable one. *Suburban Auto Rebuilders, Inc. v. Associated Tile Dealers Warehouse, Inc.*, 388 Ill. App. 3d 81, 92 (2009). A contract is construed in accordance with the ordinary expectations of reasonable people. *Smith v. West Suburban Medical Center*, 397 Ill. App. 3d 995, 999 (2010). Courts will construe a contract reasonably to avoid absurd results. *Foxfield Realty v. Kubala*, 287 Ill. App. 3d 519, 524 (1997). Plaintiff argues that defendants' assertions on appeal must fail because their argument does not give any meaning to the payment guarantee clause while the trial court's construction of the contract gave meaning and effect to every provision. We disagree with plaintiff's contention that defendants' interpretation of the contract eliminates the effect of the patient guarantee provision. The patient guarantee states that Butler "hereby agrees to and guarantees payment of all charges incurred for the account of the patient." When reading the courtesy claim clause and the patient guarantee together, it is clear to this court that the language of the patient guarantee overlaps with the courtesy claim clause rather than running contrary to it, as plaintiff suggests. Since the language must be construed against plaintiff, the drafter, we find

that when read together, the courtesy claim clause and the patient guarantee exemplify the parties' intent to hold Butler responsible for any payment *not covered by insurance*.

¶ 31 Plaintiff further asserts that the courtesy claim clause is meant only to modify the assignment of insurance benefits clause. The assignment of insurance benefits clause states that Butler "irrevocably assigns and transfers to [plaintiff] all right, title[,] and interest to medical reimbursement benefits under any and all applicable medical insurance policies covering patient for the payment of hospital and medical care being provided." The trial court held that the language of the assignment of benefits clause controlled since "[n]owhere in the agreement does it state that [p]laintiff is responsible for submitting all bills to Butler's insurance." We find that when the assignment of benefits clause is read in conjunction with the courtesy claim clause, it overlaps with Butler's duty to pay *if insurance did not cover all bills*. It is simply illogical to assume otherwise. There would be no need for Butler to assign her reimbursement interest "under any and all applicable medical insurance policies covering patient ***" if the parties had no intent for plaintiff to bill Butler's insurance carrier. Dr. Michael testified that plaintiff considers a third-party carrier to be the patient's insurance company in the context of a personal injury action. However, the contract does not define the phrase "insurance policies covering patient," and according to the plain meaning of that phrase, it would be improper for this court to find that Butler would have reasonably expected such language to refer to a third-party carrier as opposed to her own. This is especially true given the fact that Dr. Michael testified that he only tells patients of plaintiff's policy of only billing third-party carriers "if it comes up." Regarding Butler, Dr. Michael stated, "I don't believe [Butler] had a discussion with me regarding [whether] she has [*sic*] insurance, why don't you bill that[]." We further note that even if we were to find that the terms of the contract were ambiguous on this issue, we would be compelled to find that

summary judgment was improper since plaintiff drafted the contract and so the terms are construed against it. *Dowd*, 181 Ill. 2d at 479 (citing *Duldulao*, 115 Ill. 2d at 493).

¶ 32 Further, Dr. Michael testified in his deposition that at the time he treated Butler, he did not contract with any insurance companies. This means that the contract's reference to "non-contracted insurance carriers" actually referred to all of plaintiff's patients' insurance carriers because, according to Dr. Michael's testimony, plaintiff did not contract with any carrier, thus rendering all insurance carriers "non-contracted." It would be absurd for plaintiff to include a provision that makes a distinction between contracted and non-contracted insurance carriers when its own policy and practice consisted of not contracting with *any* insurance carrier. Further, at no point does the contract define the term "non-contracted," and so it would be unreasonable to presume that Butler knew or should have known the implications of that term. The label "non-contracted" creates a distinction without a difference in the context of plaintiff's own policies, and so construing such a provision against Butler would lead to an absurd result that would be contrary to Illinois law. *Foxfield Realty*, 287 Ill. App. 3d at 524.

¶ 33 Because we have found that according to the plain language and parties' intent, plaintiff had the duty to first bill Butler's insurance carrier before any amount became due, we next examine whether defendants sufficiently showed that a genuine issue of material fact exists regarding plaintiff's performance. Defendants argue that Dr. Michael's admission that he did not bill Butler's insurance company was evidence of a material breach by plaintiff and created a genuine issue of material fact. Plaintiff asserts that defendants are precluded from arguing that it breached the contract because they neither pled this contention as an affirmative defense nor argued on appeal that the trial court's finding that defendants' argument of material breach was outside the scope of the summary judgment motion. Plaintiff further argues that even if the issue

of material breach were before this court, defendants failed to produce evidence that the breach was material. We disagree with plaintiff's framing of this issue. Rather than focusing on whether defendant was required to plead as an affirmative matter that plaintiff breached the contract, we examine whether the materials plaintiff relies upon establish the validity of its factual position on all contested elements of the cause of action. *Direct Auto Insurance Co. v. Beltran*, 2013 IL App (1st) 121128, ¶ 43. One of the elements of a claim for breach of contract is the performance of the contract's conditions by plaintiff. *Carlton*, 401 Ill. App. 3d at 531. In this case, defendants contest the element of plaintiff's performance.

¶ 34 Defendants presented sufficient evidence to create a question of material fact regarding whether plaintiff performed the conditions of the contract. Contrary to the trial court, we find that plaintiff was required to bill Butler's insurance carrier prior to her becoming responsible for any remaining balance. Thus, Dr. Michael's deposition testimony, which was attached to defendants' response to the motion for summary judgment, created a question of material fact on this issue. In addition to the relevant testimony set forth above, Dr. Michael testified that he would not have billed Butler's insurance even if it covered the procedures he performed. Rather, he stated "I would have billed work comp [*sic*] or personal injury. In this case I would bill the third party payer, the liability payer. I mean, we bill the patient but the patient in turn gives it to her attorney who then negotiates the settlement at the other end." Dr. Michael further explained by stating, "I believe it's unethical to charge an insurance company for a personal injury claim. It's not their problem, even though they will pay if a physician decides to do it that way." We need not address the affirmative matter of plaintiff's material breach, because the issue before this court is whether a question of fact exists within plaintiff's *prima facie* case for breach of

contract. We further find that because there is a question of fact based on deposition testimony, summary judgment on count II was improper.

¶ 35 Constructive Trust

¶ 36 Next, we review whether the trial court erred in granting summary judgment in favor of plaintiff against Dombrowski on count I relating to a claim for a constructive trust. On appeal, defendants argue that the trial court erred in finding that an independent medical examination is covered under the Act. Defendants also assert that plaintiff failed to comply with the requirements of the Act because the lien notice sent by plaintiff was not for Butler's treatment, care, or maintenance. In response, plaintiff argues that the trial court did not err in finding the lien enforceable, because defendants had actual notice of plaintiff's lien and including a description of services rendered is not required under the Act.

¶ 37 Section 23/10(a) of the Act provides:

¶ 38 "[e]very health care professional and health care provider that renders any service in the treatment, care, or maintenance of an injured person *** shall have a lien upon all claims and causes of action of the injured person for the amount of the health care professional's or health care provider's reasonable charges up to the date of payment of damages to the injured person. The total amount of all liens under this Act, however, shall not exceed 40% of the verdict, judgment, award, settlement, or compromise secured by or on behalf of the injured person on his or her claim or right of action." 770 ILCS 23/10(a) (West 2008).

¶ 39 "[A] lien is a legal claim upon the property of another for payment or in satisfaction of a debt. Thus, regardless of whether there is a recovery, if there is no debt in the first instance, there is no need for a lien." *N.C. ex rel. L.C. v. A.W. ex rel. R.W.*, 305 Ill. App. 3d 773, 775 (1999). "A constructive trust is one raised by operation of law as distinguished from a trust created by express agreements between the settler and the trustee." *Perry v. Wyeth*, 25 Ill. 2d 250, 253 (1962). A constructive trust is generally imposed in two situations: first, where actual or constructive fraud is considered as equitable grounds for raising the trust, and second, where

there is a fiduciary duty and a subsequent breach of that duty. *Charles Hester Enterprises, Inc. v. Illinois Founders Insurance Co.*, 114 Ill. 2d 278, 293 (1986).

¶ 40 In *N.C.*, the court found that the hospital's lien ceased to exist when the patient's debt to the hospital was extinguished pursuant to a contract between the hospital and the patient's insurer, under which all debts were extinguished once the insurer paid the hospital at the agreed rate. *N.C.*, 305 Ill. App. 3d at 775. The plaintiff filed a personal injury action against the defendant based on injuries sustained during an automobile accident. *Id.* at 774-775. During the pendency of the suit, the hospital that treated the plaintiff for injuries resulting from the accident took a lien pursuant to the Act against the proceeds of the lawsuit. *Id.* The plaintiff filed a petition to adjudicate the lien. *Id.* Subsequently, the defendant's liability carrier offered the defendant's policy limit of $100,000 as full and final payment for the plaintiff's claim against the defendant. *Id.* The plaintiff accepted the offer. *Id.* The trial court then determined that the hospital's lien should be extinguished because the hospital's contract with the plaintiff's insurer precluded it from collecting its lien. *Id.* Specifically, the court examined the contract which provided that plaintiff's insurer would provide bulk business to the hospital in return for the hospital receiving a reduced rate as full payment for its services. *Id.* at 775. The contract also provided that, except for deductibles, coinsurance, copayments, and charges for nonapproved and noncovered services, a member, such as the plaintiff, was not liable for any amount over what was paid by the insurer. *Id.* As a result, the *N.C.* court found that since the contract extinguished the plaintiff's debt, the hospital no longer had any putative lien rights regardless of whether there was a recovery in the personal injury action. *Id.*

¶ 41 In this case, we have found that a question of fact exists as to whether plaintiff can sustain its cause of action for breach of contract against Butler. Based on that ruling,

Dombrowski's liability becomes unclear. If, at the conclusion of this case, the trier of fact were to find that Butler owed an amount different from the total that plaintiff alleges is owed (which was the basis for the calculation of Dombrowski's liability), or if the trier of fact were to find in favor of Butler, Dombrowski would not be liable, at least not in the same amount as previously found by the trial court. In other words, if it is ultimately determined that plaintiff's non-performance extinguished Butler's debt, then plaintiff would no longer have any putative lien rights. Although we are not faced with the same type of contractual relationship here as was at issue in *N.C.*, the holding there, nonetheless, makes clear that when an underlying debt is extinguished so too is the resultant lien. *N.C.*, 305 Ill. App. 3d at 775. Since we have reversed the granting of summary judgment in favor of plaintiff as to Butler, a genuine issue of material fact regarding Dombrowski's liability exists until the trier of fact determines whether Butler owes a debt. Therefore, we also reverse the trial court's determination of summary judgment in favor of plaintiff against Dombrowski.

¶ 42 Motion to Reconsider

¶ 43 Although defendants make a distinct argument regarding the trial court's denial of their motion to reconsider, we need not address their contentions separately. We have found that the trial court erred in granting summary judgment as to both counts of plaintiff's complaint, thus it follows that the trial court's denial of defendants' motion to reconsider was likewise improper.

¶ 44 Reasonableness of Medical Bills

¶ 45 We have reversed the trial court's grant of summary judgment as to both counts of plaintiff's complaint and vacated the judgments against both Butler and Dombrowski. Therefore it is not necessary for us to address whether the court's finding that Dr. Michael's bills were reasonable and customary was against the manifest weight of the evidence. Rather, the issue of

what, if any, amount plaintiff may recover is a question that shall be addressed by the trier of fact on remand.

¶ 46 CONCLUSION

¶ 47 Based on the foregoing, we find that a genuine issue of material fact exists as to both counts of plaintiff's complaint. Thus we reverse the trial court's order granting summary judgment, vacate the judgments entered pursuant thereto, and remand for further proceedings.

¶ 48 Reversed and remanded.